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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

* * * *

CHARLES W. SIZEMORE, D.D.S.,
Petitioner

V.

TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

* * * *

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * * *

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

JAMES C. TODD, Chief
General Litigation Div.

BROOKS WM. CONOVER, III
Assistant Attorney General

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CHARLES W. SIZEMORE, D.D.S.,
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TEXAS STATE BOARD OF DENTAL EXAMINERS,
Respondent

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * * *

To the Honorable Members of the Supreme Court of the United States:

The Texas State Board of Dental Examiners, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The Texas Supreme Court entered an opinion June 22, 1988, and, after denying Petitioner's Motion for Rehearing on November 23, 1988, issued its mandate on December 12, 1988. The June 22,

1988, opinion is reported at 759 S.W.2d 114 (Tex. 1988) (Pet. App. M, PP. 56a). The opinion of the Court of Appeals, Fifth Supreme Judicial District, Dallas is reported at 747 S.W.2d 389 (Tex. App.--Dallas 1987) (Pet App. G-K, PP. 27a-53a). The district court opinion and judgment is not reported but can be found as Petitioner's Appendices D, E, and F. PP. 19a-26a.

STATEMENT CONCERNING JURISDICTION

This is a civil appeal from the highest court of the State of Texas. The Supreme Court of Texas rendered its judgment on June 22, 1988, and overruled Petitioner's Motion for Rehearing on November 23, 1988 (Pet. App. A, PP. 1a). The Petitioner invokes the jurisdiction of this Court under 28 U.S.C., Section 1257(3).

STATUTES INVOLVED

TEX.REV.CIV.STAT.ANN. art. 4549, Sections 3(c), 3(i), 3(j) and 4(b); TEX.REV.CIV.STAT. ANN. art. 4551h; and TEX.REV.CIV.STAT.ANN. art. 6252-13a, Section 19 govern the suspension of Petitioner's dental license.

SUMMARY OF THE CASE

In response to Department of Public Safety concerns about controlled substance prescriptions being written by Dr. Sizemore, the Texas State Board of Dental Examiners (the Board) investigated the nature and purpose of several unusual prescriptions for Percodan. The Board then initiated a complaint against Sizemore for prescribing drugs which were not necessary or required in the practice of dentistry; for dishonorable conduct in grossly over-prescribing Percodan to three of his patients; and for failing to

note the prescription of over 800 dosages of Percodan in his patients' records.

At the administrative hearing, the Board received corroborative evidence regarding the allegations in the form of admissions by Sizemore, dental records, original prescriptions for Percodan, DPS triplicate prescription records, and expert testimony. The expert, Dr. Arthur H. Jeske, who is an associate professor of pharmacology and restorative dentistry, testified that the Percodan prescriptions were neither necessary nor required and could promote and/or further addiction of the patients involved. Dr. Jeske never examined the patients in question, but based his expert opinion on a review of the patients' dental records and his knowledge of dentistry and pharmacy, including learned treatises.

Upon the conclusion of the evidence, the Board found the allegations true and suspended Sizemore's dental license for five years with all but 120 days probated upon condition that Sizemore surrender his DEA controlled substance certificate. Sizemore appealed the decision to the 95th Judicial District Court of Dallas County, Texas, which affirmed the Board's suspension as being supported by substantial evidence in the record as a whole in that reasonable minds could have reached the conclusion the Board must have reached in order to justify its conclusion.

Thereafter, Sizemore appealed the trial court's judgment to the Fifth Supreme Judicial District Court of Appeals in Dallas, Texas, which reversed the Board's order, in part, on the basis of no substantial evidence to support 12 of the allegations, and which remanded the case, in part, for reassessment of the evidence and punishment on the 2 remaining allegations. After its Motion for

Rehearing was overruled, the Board filed an Application for Writ of Error with the Texas Supreme Court. The Texas Supreme Court overturned the intermediate appellate court's decision and affirmed the Board's original suspension of Sizemore's dental license. Once that court overruled his motion for rehearing and issued its mandate, Sizemore petitioned this Court for writ of certiorari.

REASONS WHY PETITION FOR WRIT SHOULD NOT BE GRANTED

The Texas Supreme Court properly held that the evidence before the Board provided a reasonable basis for the suspension of Petitioner's dental license and that the substantial evidence rule governed judicial review of the Board's disciplinary action.

STATEMENT OF THE CASE

QUESTION 1

ARE THE DICTATES OF DUE PROCESS SATISFIED IN A LICENSEE'S DISCIPLINARY PROCEEDINGS WHERE THE EVIDENCE IN THE RECORD AS A WHOLE IS SUCH THAT REASONABLE MINDS COULD HAVE REACHED THE CONCLUSIONS THE AGENCY MUST HAVE REACHED IN ORDER TO JUSTIFY ITS ACTIONS?

"The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based." *Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1942). An administrative agency's findings of fact in a contested case establish the existence of those factual predicates which invoke applicable rules of law and lay the foundation upon

which those rules operate. In the context of judicial review of contested cases before an administrative tribunal, however, the agency's fact findings enable a reviewing court to know the grounds upon which the agency applied rules of law forming the basis of its decision. *Id.* at 87. In other words, the reviewing court must be able to understand the basis for the agency's decision. *United States v. Chicago, M.St.P. and P.R. Co.*, 294 U.S. 499, 504-05 (1935); *Securities and Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). The findings and orders of the Respondent Board are such that this Court can easily ascertain whether the decision to suspend Petitioner's dental license is reasonably supported by the evidence in the record as a whole. (Pet App. C, PP. 12a-18a).

The Texas Supreme Court observed, in an opinion by Chief Justice Thomas R. Phillips (Pet. App. M, PP. 58a):

> The substantial evidence test is applicable to cases involving judicial review of decisions of the Board of Dental Examiners. TEX.REV.CIV.STAT.ANN. art. 4548h, § 3(e). The test, as stated many times by this Court, is whether the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *E.g., Dotson v. Texas Bd. of Medical Examiners*, 612 S.W.2d 921, 922 (Tex. 1981); *Railroad Comm'n v. Shell Oil Co.*, 161 S.W.2d 1022, 1029 (1942). In determining whether there is substantial evidence, the reviewing court may not substitute its judgment for the Board's, but must consider only the record upon which the decision is based. *Railroad Comm'n v. Entex, Inc.*, 599

> S.W.2d 292, 298 (Tex. 1980). The burden is on the complaining party to demonstrate an absence of substantial evidence. *Auto Convoy Co. v. Railroad Comm'n*, 507 S.W.2d 718, 722 (Tex. 1974).

See TEX.REV.CIV.STAT.ANN. art. 6252-13a, Section 19(e). The Court then proceeded to review the administrative record to determine whether substantial evidence existed to support the Board's decision. (Pet. App. M, PP. 60a-62a).

The substantial evidence test is the standard employed by federal courts sitting in review of a federal agency's decision. In *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529, 1539-40 (11th Cir. 1985), Circuit Judge Tjoflat penned:

> In reviewing administrative fact findings to determine whether they are supported by substantial evidence, we must look at the record in its entirety... . *NLRB v. Southern Florida Hotel and Motel Ass'n*, 751 F.2d 1571, 1579 (11th Cir. 1985) quoting *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence supporting the agency's findings exists, if the record reveals "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Universal Camera*, 340 U.S. at 477; *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 337 (5th Cir. 1980); *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 970 (D.C. Cir. 1979)(construing 49 U.S.C. App. § 1486(e)). "[We] must decide only whether the agency made a

> reasonable finding... ." *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d at 338. (Parallel citations omitted).

See also Wilbanks v. Secretary of Health and Human Serv., 847 F.2d 301 (6th Cir. 1988). He further reasoned that deference must be given to the agency's fact findings when the evidence may fairly support two conflicting views. *City of Pompano Beach*, 774 F.2d at 1540, *citing Southern Florida Hotel*, 751 F.2d at 1579 (quoting *Universal Camera*, 340 U.S. at 488).

The reviewing court is forbidden "...from usurping the agency's adjudicative authority even though the court may have struck a different balance." (Pet. App. M, PP. 59a). *See also Id.; City of Galveston v. United States*, 257 F.Supp. 243, 245-46 (1966), *aff'd*, 386 U.S. 269 (1967); *Holley v. Seminole County School Dist.*, 755 F.2d 1492, 1499-1500 n. 5 (1985). In *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966), this Court observed, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *See also Illinois Cent. R. Co., et al. v. Norfolk and W. Ry. Co.*, 385 U.S. 57, 67 (1966). It is the triers of fact who have the duty to resolve those conflicts. *Richardson v. Perales*, 402 U.S. 387, 399 (1971). *See also Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. at 88. The evidence before the Board in this case reasonably supported the decision to suspend Petitioner's license.

Petitioner admitted that he prescribed 280 capsules of the narcotic Percodan, a Schedule II controlled substance, to patient McKay on twelve separate occasions. (*See* Petitioner's direct testimony; Transcript of Proceedings, beginning at

P. 95, L. 6). The triplicate prescription records from the Texas Department of Public Safety, admitted into evidence at the hearing (Transcript of Proceedings, P. 4, LL. 18-25), document this finding as do the original prescriptions, which were similarly received by the Board. (Transcript of Proceedings, P. 5, *supra*).

Petitioner admitted and did not contest the finding that he omitted to note the issuance of ten out of twelve prescriptions of Percodan, or 230 capsules, to patient McKay. In addition to Petitioner's admission, the Board relied on the patient records (Transcript of Proceedings, P. 6, *supra*), the original prescriptions (Transcript of Proceedings, P. 5, *supra*), and the Department of Public Safety triplicate prescription records (Transcript of Proceedings, P. 4, *supra*), as evidence to support this finding.

The Board relied on the expert testimony of Dr. Arthur Jeske, who testified "with a reasonable degree of medical certainty" that Petitioner prescribed controlled substances to patient McKay that were not necessary or required. (Transcript of Proceedings, P. 18, L. 11 to P. 19, L. 6). It was Dr. Jeske's testimony which established of record Percodan's properties and effects: that as a chemical relative of morphine it is a strong narcotic analgesic that relieves pain centrally; and that it has an addictive quality, creating both physical and psychological dependence by producing a state of euphoria in the user. (Transcript of Proceedings, P. 13, L. 12 to P. 14, L. 6). In evaluating the use of Percodan for twelve months by patient McKay, who exhibited symptoms of temporal mandibular joint (TMJ) pain, Dr. Jeske stated the treatment of the pain during which time "no definitive dental therapy was performed to alleviate the problem" was in excess of generally accepted

dosages for dental treatment. (Transcript of Proceedings, P. 18, L. 21 to P. 19, L. 1). He further testified that the "quantity was addictive." (Transcript of Proceedings, P. 77, LL. 12-13).

Added to this evidence were the admissions by the Petitioner regarding the problem which arose during his course of treatment of the TMJ-related pain. Petitioner's testimony indicates McKay received no dental treatment for over four months because he allegedly had no time for the necessary procedures. In the words of Justice McCraw's dissenting opinion in the court of appeals (Pet. App. I, P. 50a):

> Sizemore admitted that he could have demanded that the patient come in to the office and suspend issuance of the prescriptions and 'probably should have.' He further admitted that 'it's obvious that my judgment was not so good [in failing to demand that the patient have treatment].' Sizemore realized that he 'may have been used by this person.'

Before the Board, Sizemore testified as follows:

> Q. Well, overall, do you think you did the patient right?
>
> A. I don't think he received the total care that he should have received, but I'm not saying that I wasn't in error of judgment, but at the same time, I'm saying that some of this was due to the patient.
>
> Q. He received the same care that you would want one of your family to receive?

A. No, he didn't, I didn't say that.

(Transcript of Proceedings, P. 283, LL. 3-12).

Q. Well, do you feel like you used good professional judgment or accepted professional judgment?

A. I feel like my judgment may have been in error.

(Transcript of Proceedings, P. 273, LL. 4-8).

As to patient Sabato, Petitioner admitted that he omitted to note the issuance of four out of 13 Percodan prescriptions for the patient. The Board's evidence to support this finding again consisted of the Department of Public Safety's triplicate prescription forms (Transcript of Proceedings, P. 4, *supra*), the original prescriptions for Percodan and Tylox (Transcript of Proceedings, P. 5, *supra*), and Sabato's patient records (Transcript of Proceedings, P. 6, *supra*). Dr. Jeske's testimony supports the finding, too. (Transcript of Proceedings, P. 22, LL. 2-4).

Dr. Jeske testified it was remarkable that patient Sabato received prescriptions for Percodan on April 27, May 9, May 13, May 18, June 2, and June 16 when no antibiotic was used in conjunction with the prescriptions. (Transcript of Proceedings, P. 23, L. 11 to P. 24, L. 11). "With a reasonable degree of medical certainty," Dr. Jeske testified specifically that the Percodan prescriptions of May 9, 13, and 18, 1983, were not necessary or required. (Transcript of Proceedings, P. 24, LL. 6-11). Petitioner gave this patient 13 prescriptions for a total of 220 capsules of Percodan, in spite of the fact that Percodan contains aspirin and the patient had indicated that she was allergic to

aspirin. "It's obvious that I overlooked that on the chart," Sizemore testified. (Transcript of Proceedings, P. 261, LL. 6-7). Moreover, the Department of Public Safety records and original prescriptions established that on March 31, May 9, and June 2, 1983, patient Sabato altered the prescriptions to obtain larger amounts of Percodan than prescribed by Petitioner. (Transcript of Proceedings, P. 4-5, *supra*).

Had Petitioner properly counselled the patient and evaluated the therapeutic purposes of his treatment, Sabato a/k/a Schultz would not have gone to such lengths to support her developing physical and psychological dependency on the drug, Percodan. (Transcript of Proceedings, P. 80, LL. 1-10). Dr. Jeske further testified that given the patient's level and dosage the generally accepted duration of Percodan treatment for severe pain is limited to five days. (Transcript of Proceedings, P. 78, L. 17 to P. 79, L. 3). Indeed, Jeske testified that a patient receiving Schedule II narcotics four times a day for even a day or two demonstrates symptoms of withdrawal upon cessation of treatment. (Transcript of Proceedings, P. 79, LL. 15-21). It is such evidence upon which the Respondent found that such prescriptions were in excess of generally accepted dosages for dental treatment.

Petitioner admitted to prescribing Percodan to a third patient, Kenneth Cook, on 21 separate occasions for a total of 382 capsules. The Board, however, relied on the Department of Public Safety triplicate prescription forms (Transcript of Proceedings, P. 4, *supra*), the patient records (Transcript of Proceedings, P. 6, *supra*), and the original prescriptions (Transcript of Proceedings, P. 5, *supra*) so to find.

Patient Cook had upper-anterior pain in his teeth. For two months, Petitioner prescribed Percodan and antibiotics prior to extracting the problem teeth. Cook received 121 tablets in this two month period. Dr. Jeske testified that although the initial Percodan prescriptions may have been necessary or required, the continued prescribing of Percodan was neither necessary nor required after the first two weeks of therapy. (Transcript of Proceedings, P. 26, L. 11). In evaluating the Petitioner's returning the patient to the Percodan/antibiotic regimen for an additional two month period, Dr. Jeske stated that in his expert opinion the prescriptions were not necessary or required after twenty-four days. (Transcript of Proceedings, P. 26, L. 11 to P. 27, L. 17).

Petitioner admitted as much at the Board hearing:

> **Q.** Okay. Did it ever occur to you in that two-month period [from December 28 to February 24] that 121 tablets of Percodan is excessive for a patient that comes into your office. Did you ever think about how much Percodan you were giving the patient?
>
> **A.** I see now in retrospect and the way it looks on this record, I should probably have noticed, but it did not occur to me or I would not have continued to prescribe it for him.

Based upon its review of this evidence, the Texas Supreme Court properly determined that the Board's suspension of Petitioner's dental license was reasonably supported by the evidence in the record as a whole. Of course, a reviewing court must also assure itself that the agency has not otherwise

acted arbitrarily. *Conservation Law Found. of New England v. Clark*, 590 F.Supp. 1467, 1473 (D. Mass. 1983). "With respect to questions of fact the proper inquiry is whether on the record as a whole the agency could reasonably make the finding that it did." *Id.* at 1474, *citing Pre-Fab Transit Co. v. United States*, 306 F.Supp. 1247, 1250 (D.C. Ill. 1969), *aff'd*, 397 U.S. 40 (1970). In other words, has the agency exercised reasoned discretion? *Id.* at 1473, *citing Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *accord, e.g., Chaney v. Heckler*, 718 F.2d 1174, 1189 n. 38 (D.C. Cir. 1983); *See also Motor and Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1123 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980) (where the court stated that the agency's administrator's "burden" is the burden of acting reasonably).

Where a matter is committed to agency discretion, the exercise of that discretion should not be disturbed on appeal unless abuse of discretion is shown. *State of Texas v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) *cert. denied*, 469 U.S. 833 (1984) (where the Dental Board did not abuse its discretion in refusing to grant dentist a continuance). *See also Withrow v. Larkin*, 421 U.S. 35, 55 (1975) and *United States v. Morgan*, 313 U.S. 409, 421 (1941). The findings and conclusions of the Board are not "...[s]o out of touch with reality revealed by the whole record as to be arbitrary and capricious. ..." *Crounse Corp. v. I.C.C.*, 781 F.2d 1176, 1187 (6th Cir. 1986), *cert. denied*, 479 U.S. 890 (1986). The decision of the Board is supported by at least the minimum quantum of evidence necessary to satisfy the due process clause. The opinion of the Texas Supreme Court should be affirmed.

QUESTION 2

MAY AN EXPERT WITNESS BASE AN OPINION IN A PARTICULAR CASE ON FACTS OR DATA PERCEIVED BY OR MADE KNOWN TO HIM AT OR BEFORE THE HEARING IF IT IS OF A TYPE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD IN FORMING OPINIONS OR INFERENCES ON THE SUBJECT?

The Texas Supreme Court correctly affirmed the Board's conclusion that Petitioner over prescribed narcotic drugs as being supported by substantial evidence. The expert witness in this case, Dr. Arthur Jeske, is both a dentist and a pharmacist. There is expert testimony in the administrative record that Percodan is a Schedule II controlled substance and that it possesses addictive qualities. (Transcript of Proceedings, PP. 13-14, *supra*). There is expert testimony to the effect that the prescriptions issued were not necessary or required in the treatment of these patients. (Transcript of Proceedings, PP. 18-19, 24, and 26, *supra*). There can be no question that Sizemore intentionally and knowingly wrote the prescriptions in the quantities and amounts found in the Board's decision. The evidence showed, and the Board found, that such intentional prescriptions were excessive, not necessary, and furthered addiction.

Prior to entering its order suspending the license, the Board members received and considered only the competent and material evidence offered during the administrative hearing. *See NLRB v. Burns*, 207 F.2d 434, 436 (8th Cir. 1953) *citing Donnelly Gammert Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1942). The Petitioner, nevertheless, would have this Court impermissibly substitute its evaluation of the expert testimony for that of the Board members. A reviewing court's characterization

of the underlying conduct in question is irrelevant. Notwithstanding Petitioner's assertion, "[s]ome adjudicative facts might very well require expert knowledge or experience to properly evaluate the evidence." *Adams v. Texas State Bd. of Chiropractic Examiners*, 744 S.W.2d 648, 654 (Tex. App.--Austin 1988, no writ). "Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge." *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134, 1138-39 (3rd Cir. 1983).

The majority's reasoning in the Court of Appeals for disregarding the expert testimony before the Board is stunning. Justice Howell, in footnote 5 at page 398, pens:

> The qualifications of expert witness Jeske are acknowledged and impressive. However, his testimony was subjective; he repeatedly attached the limiting phrase "in my opinion" to his testimony... .

Compare DaSilva v. American Brands, Inc., 845 F.2d 356, 361 (1st Cir. 1988) (the use of the terms "my belief" or "could have" is sufficient to support an expert's conclusions and opinions). This Court stated in *NLRB v. Pittsburg S.S. Co.*, 337 U.S. 656, 660 (1949) that the evidence relied on by the agency must itself be incredible, and "carry its own death-wound" in order for the reviewing court to find that a hearing is unfair.

TEX. R. EVID. 703 and 705 are dispositive.

> The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the

> underlying facts or data, unless the Court requires otherwise... .

TEX. R. EVID. 705 (1983). *See also* FED. R. EVID. 703 and 705. "This rule makes no mention of just how much underlying data should be disclosed or the manner in which it should be presented." Wendorf and Schlueter, *Texas Rules of Evidence Manual* (1983), p. 157.

The Petitioner's requirement that expert witnesses in a Dental Board disciplinary proceeding examine the patients of the practitioner under review renders the following evidentiary rule meaningless:

> The facts or data in the particular case upon which an expert bases an opinion or inferences may be perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TEX. R. EVID. 703 (1983); *See also Barefoot v. Estelle*, 463 U.S. 880, 903-05 (1983) (predictions of future dangerousness by a psychiatrist who had never examined the defendant were allowed); *Teen-Ed, Inc. v. Kimball Intern., Inc.*, 620 F.2d 399, 402-03 (3rd Cir. 1980); *Moore v. Grantham*, 599 S.W.2d 287, 290 (Tex. 1980); *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180, 186 (Tex. 1972); *Trailways, Inc. and Trailways of Texas, Inc. v. Mendoza*, 745 S.W.2d 63 (Tex. App.--San Antonio 1988, no writ); *Lipsey v. Texas Dep't of Health*, 727 S.W.2d 61, 72 (Tex. App.--Austin 1987, writ ref'd n.r.e.) and *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 330-31 (Tex. Civ.

App.--Austin 1975, no writ). In reality, the Petitioner is objecting to the form of the expert testimony rather than its substance.

It requires no great leap of faith for this Court to find the Board members could have reasonably concluded that Petitioner consequently engaged in dishonorable or unprofessional conduct by "grossly over prescribing ... narcotic drugs, ... or controlled substances." Unless the decision is "so overwhelming ... as to shock the conscience or to show clearly that the conclusion reached was wrong, or was the result of passion, prejudice or improper motive," a reviewing court should not disturb fact-findings based upon "conflicting evidence where there is some evidence to support" the decision. *Trailways, Inc. v. Mendoza*, 745 S.W.2d at 66; *See also Swinney v. Winters*, 532 S.W.2d 396, 406 (Tex. Civ. App.--San Antonio 1975, writ ref'd n.r.e.).

QUESTION 3

DOES THERE EXIST A RATIONAL BASIS FOR THE TEXAS LEGISLATURE TO HAVE PROVIDED FOR DIFFERENT STANDARDS OF JUDICIAL REVIEW FOR DIFFERENT PROFESSIONS WITHOUT DENYING EQUAL PROTECTION?

Texas courts have consistently held that the right to trial by jury does not apply to administrative proceedings generally. *State of Texas v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 293 (Tex. 1975), *citing State v. DeSilva*, 145 S.W.2d 230 (Tex. 1912), and *Texas Liquor Control Bd. v. Jones*, 112 S.W.2d 227 (Tex. Civ. App.--Texarkana 1937, no writ). Furthermore, it is clear that judicial appeals from administrative agency decisions may properly be conducted under the substantial evidence rule, which does not include a right to

trial by jury. *Halsell v. Texas Water Comm'n*, 380 S.W.2d 1 (Tex. Civ. App.--Austin 1964, writ ref'd n.r.e.); *Lewis v. Metropolitan Sav. and Loan Ass'n*, 550 S.W.2d 11 (Tex. 1977); *McConnell v. Alamo Heights Indep. School Dist.*, 576 S.W.2d 470 (Tex. Civ. App.--San Antonio 1978, writ ref'd n.r.e.). *See also McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (due process does not require trial by jury in civil juvenile delinquency proceedings); *Dorsey v. Solomen*, 435 F.Supp. 725, 733 (1977), *citing Doremus v. Farrell*, 407 F.Supp. 509, 516 (D. Neb. 1975) (due process does not require jury trial in civil commitment proceeding).

In the most recent state court opinion on this issue, the Court of Appeals for the Third Supreme Judicial District at Austin has written that the cause of action is 'purely statutory' in that the rights to be enforced and the remedies provided were not known at common law. Simply put, the legislature is only prohibited from abrogating "the right to a jury trial if it existed by statute or under the common law *at the time the Constitution was adopted in 1876*." *Adams*, 744 S.W.2d at 651. Similar reasoning applies to substantial evidence review under the Dental Practice Act. *See also Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400, 405 (Tex. Civ. App.--San Antonio 1972, writ ref'd n.r.e.), *appeal dismissed*, 409 U.S. 1020 (1972) (for authority that trial by jury is not required in a proceeding to review the order of an administrative agency where the substantial evidence rule is the statutory standard of review). In 1978, the Texas Supr[illegible]ourt said, in *Southwestern* [illegible] *v. Publi*[illegible] .W.2d 503, 51[illegible] 1978), [illegible]ational infirmity [illegible]iting judici[illegible]ord taken be[illegible] admini[illegible]- *bama Pub.* [illegible] *Co.*[illegible], [illegible]1 U.S. 341, [illegible]951).

The Texas Constitution contains two separate provisions regarding the right to trial by jury. The first is Article I, Section 15, found in the Bill of Rights of the Constitution; the second is Article V, Section 10, contained in the Judiciary Article. The Bill of Rights provision continues the right to a jury in all actions where the right existed at the time the constitution was adopted. *See Credit Bureau of Laredo*, 530 S.W.2d 288, 291. The present Constitution was adopted in 1876; dentists were specifically exempted from the operation of the 1873 Medical Practice Act in 1907; and the Dental Practice Act was initially enacted by the Acts of 1919, 36th Leg., ch. 31, p. 50. Prior to 1919, there was no requirement for licensure of dentists, and consequently there could be no sanctions imposed against a non-existent license. It follows, therefore, that the Petitioner would not be entitled to a jury trial under the Bill of Rights Jury Article.

The Judiciary Article, Article V, Section 10, provides for jury entitlement in the "trial of all causes." The Texas Supreme Court defines "cause" as a "suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice." *Id.* at 292. The Court points out that not all adversarial proceedings qualify as a "cause" under the Judiciary Article. It is submitted that an administrative disciplinary hearing is not a "cause" as that term has been defined by the Texas Supreme Court, and therefore, Petitioner is not entitled to a jury.

Petitioner now asks this Court to declare unconstitutional the provisions of TEX.REV.CIV.STAT. ANN. art. 6252-13a, Section 19(e), the Administrative Procedure and Texas Register Act (the APTRA) which provide for appeal of administrative orders under the substantial evidence rule. Petitioner argues that because dentists in Texas are

allowed to appeal under the substantial evidence rule while attorneys are allowed to pursue appeals by trial *de novo*, Petitioner, whose appeal comes under the substantial evidence rule, is denied Sixth and Seventh Amendment rights to trial by jury and is denied equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

The question of whether the split system of review constitutes a denial of equal protection has not been directly addressed by the appellate courts of this state. However, it is very clear that the courts have condoned both types of review in upholding administrative review under both the trial *de novo* and substantial evidence rule provisions. *Scott v. Texas State Bd. of Medical Examiners*, 384 S.W.2d 686 (Tex. 1964); *Martinez*, 476 S.W.2d at 405. In Texas there is no right to appeal from an administrative order unless an appeal is statutorily provided or the administrative order adversely affects a vested property right. *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385, 386-87 (Tex. 1967).

It has also been held that where such a property right exists, a licensee's due process rights to an appeal are adequately protected by a substantial evidence review. *Martinez*, 476 S.W.2d at 405. Therefore, the holding in *Martinez* indicates that the legislature may provide for appeal by substantial evidence review without violating due process rights. In *Sherman v. Texas State Bd. of Dental Examiners*, 116 S.W.2d 843, 846 (Tex. Civ. App.--San Antonio 1938, writ ref'd), it was held that although a license to practice was a valuable property right, "it is not such a vested right, in the constitutional sense, that it may not be revoked for good cause, and such revocation is not a taking

of property without due process." *See also State of Texas v. Crank*, 666 S.W.2d 91.

Petitioner's basic contention, however, is that the legislature, in providing that dentists must appeal adverse administrative rulings under the substantial evidence rule while attorneys appeal by trial *de novo*, has violated dentists' right to equal protection. Petitioner has not urged the application of the "strict scrutiny" test, which is inappropriate because professions are not a suspect classification, but instead argues that there is no "rational basis" for the distinction as to manner of appeal. *See Harper v. Lindsay*, 616 F.2d 849, 854 (5th Cir. 1980), *citing Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir. 1978). "Equal protection of the law simply means that similarly situated persons receive similar treatment under the law." *Dorsey*, 435 F.Supp. at 734, *citing Reed v. Reed*, 404 U.S. 71, 75 (1971). Here, all dentists are treated the same for purposes of judicial review.

It is well settled that a state may categorize its citizens on the basis of their professions and may make different laws respecting groups so classified. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935); *Tigner v. State of Texas*, 310 U.S. 659 (1940). *See also Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642 (Tex. 1971); *Railroad Comm'n v. Miller*, 434 S.W.2d 670 (Tex. 1968); *Jefco, Inc. v. Lewis*, 520 S.W.2d 915 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.). This Court in *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) recognized that "the equal protection clause of the Fourteenth Amendment does not require states to treat different groups in the same manner. Only unreasonable discriminations are forbidden." Additionally,

> "very wide discretion must be conceded to legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation. ... If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection." *Brown-Foreman Co. v. Kentucky*, 217 U.S. 563 (1910).

Furthermore, "The mere fact that discrimination is made does not necessarily vitiate the classification, and unless there is no substantial basis for the discrimination, there is no warrant for judicial interference." *Dodgen v. Depuglio*, 209 S.W.2d 588, 594 (1948). In determining whether there is any substantial basis for the classification "the test is whether there is any basis for the classification" which could have seemed reasonable to the Legislature." *Miller*, 434 S.W.2d at 673, *citing San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813 (1957). The equal protection clause, moreover, does not require "absolute equality or precisely equal advantages." *Dorsey*, 435 F.Supp. at 735, *citing San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1974).

This Court has held that "statutory discrimination will not be set aside if any statement of facts reasonable may be conceived to justify it..." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Petitioner's burden before this Court is a heavy one. Petitioner must show that there was no conceivable basis upon

which the legislature could have founded its determination to provide for substantial evidence review in some cases while not in others.

The difference in the standard of review between dentists and attorneys stems from the applicability of the Administrative Procedure and Texas Register Act. The APTRA applies to legislative and executive agencies, boards, and commissions, but does not apply to the courts, which are in the judicial branch. *See* TEX.REV.CIV.STAT.ANN.art. 6252-13a Section 3(1). This Court has given great deference to legislative purposes to create a strong presumption of constitutionality. *See City of New Orleans v. Duke*, 427 U.S. 297 (1976); *McGowan*, 366 U.S. at 425-26. Traditionally, this Court has upheld any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. ..." *Allied v. Bowers*, 358 U.S. 522, 530 (1959).

As the highest state judiciary body, the Texas Supreme Court has the "inherent power to regulate the practice of law," State Bar Rules, Preamble, and disciplinary action by the State Bar is subject to the supervisory power of the Texas Supreme Court. Texas State Bar Rules, Article X, § 1. *See also P.U.C. v. Cofer*, 754 S.W.2d 397, 398-99 (Tex. 1979). Since the judiciary is a separate branch of government not subject to the APTRA, the Texas Supreme Court has promulgated its own rules concerning the standard of review in license revocation proceedings of attorneys and has chosen trial *de novo*. Therefore, the different standards of review for dentists and attorneys stems from the fact that the Dental Board is an executive agency subject to APTRA while attorneys are licensed through the Texas Supreme Court, which as the judicial branch is not subject to APTRA.

Finally, on pragmatic rather than constitutional grounds, the Board urges against the striking of the substantial evidence review. Under the provisions of the Administrative Procedure Act, the Board of Dental Examiners and other administrative agencies are held to strict rules of procedure that approximate and occasionally exceed those required of the courts. *See* Judge McGee's dissent in *Lewis v. Metropolitan Sav. and Loan Ass'n*, 550 S.W.2d 11, 16-17 (Tex. 1977). The *de novo* appeal renders worthless the agency record that is required to be so carefully prepared. Therefore, if any change is to be made to equalize the method of judicial review of administrative orders it is the *de novo* rather than the substantial evidence review that should be eliminated. However, in absence of any constitutional deficiencies in the present methods of review, such changes should remain the province of the legislature rather than the courts.

CONCLUSION

Because the law governing the issues raised by Petitioner is well settled, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

JAMES C. TODD, Chief
General Litigation Div.

BROOKS WM. CONOVER, III
Assistant Attorney General
General Litigation Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 Ext. 208

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 24th day of April, 1989, to:

Mr. Joe Alfred Izen, Jr.
5222 Spruce Street
Bellaire, Texas 77401

L.T. Bradt
4216 Lockefield
Houston, Texas 77092

Mr. Michael Louis Minns
10200 Old Katy Road, Suite 101
Houston, Texas 77043

_____
BROOKS WM. CONOVER, III